No. 77-1447

In the Supreme Court of the United States

OCTOBER TERM, 1977

RETAIL STORE EMPLOYEES UNION, LOCAL 876, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COMER,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 570 F.2d 586. The decision and order of the National Labor Relations Board (Pet. App. 17a-45a) are reported at 219 NLRB 1188.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1978. The petition for a writ of certiorari was fiied on April 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(4) of the National Labor Relations Act by discharging an employee because she refused to testify to matters of which she had no personal knowledge in an unfair labor practice proceeding involving a former fellow employee.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) is set forth at Pet. 3.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(4) and (1) of the Act, 29 U.S.C. 158(a)(4) and (1), by discharging employee Anna Pennacchini in the following circumstances:

Early in 1973, the Board's General Counsel issued a complaint charging that petitioner had unlawfully discharged employee Barbara Frazier. In preparing its defense, petitioner's president, Horace Brown, ordered Pennacchini to draw up a list of Frazier's

alleged transgressions, which were based on "[d]ifferent rumors that [Brown] had heard" about Frazier (Pet. App. 28a; A. 123-125).[1] Thereafter both Brown and Union Secretary-Treasurer Lodico gave Pennacchini additional items to add to the list (A. 140, 144-145). Pennacchini compiled the list, although she had not actually witnessed the alleged incidents (Pet. App. 28a; A. 123).

The Board hearing in the Frazier case was scheduled to begin on October 17, 1973. On October 16, Pennacchini and Brown attended an afternoon meeting at the offices of petitioner's attorney. The attorney handed Pennacchini the list which she had made and asked her if she was "prepared to testify at Barbara Frazier's trial * * * to substantiate these alleged violations." Pennacchini responded that she had "never personally observed" any of the alleged incidents and further told counsel, "I know you would not want me to testify to something I did not personally observe." Pennacchini was not called to testify at the Frazier trial, and was not subpoenaed to appear. (Pet. App. 20a, 28a, 36a; A. 126, 153.)

On November 14, a month after Pennacchini's statement, Brown discharged her, accusing her of "extraordinary disloyalty" and of "conveniently 'forget[ting]'" alleged facts on the prepared list (Pet. App. 3a-4a, 19a-20a).

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[1] "A." references are to the printed appendix filed in the court of appeals. A copy is lodged with this Court.

2. The Administrative Law Judge, whose decision was upheld by the Board, found that Pennacchini was discharged because she declined, on the basis of lack of personal knowledge, to give testimony "to substantiate [the] alleged violations" committed by Frazier contained on the list she had prepared for Brown (Pet. App. 36a, 40a, 18a). The Board found that in so doing petitioner violated Section 8(a)(1) and (4) of the Act (Pet. App. 20a, 40a-41a), and ordered petitioner to reinstate Pennacchini to her former position (Pet. App. 42a).

The court of appeals agreed with the Board that Pennacchini's discharge violated Section 8(a)(4) of the Act.[2] The court noted (Pet. App. 5a) that Pennacchini "was asked by the union if she would testify in support of certain allegations against Frazier and she refused." She "was fired because she would not testify in support of the union's position at the Frazier unfair labor practice proceeding" (Pet. App. 5a-6a). It added: "What we are protecting here * * * is not simply a refusal to testify * * *. Rather, we are protecting employees from pressure to deliver false or misleading information to the Board" (Pet. App. 9a).

The court of appeals noted that, in *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 122, this Court had stated that Congress intended Section 8

[2] The court found it unnecessary to "review the Board's finding with respect to § 8(a)(1)" (Pet. App. 1a, n. 1).

(a)(4) "to afford broad rather than narrow protection to the employee," and that the "protection [of Section 8(a)(4) was] needed to preserve the integrity of the Board process in its entirety." *Id.* at 124. The court of appeals here concluded (Pet. App. 8a; footnote omitted):

> We think that the "integrity of the Board process in its entirety" would be seriously undercut if employers were allowed to freely discharge employees who because of lack of knowledge refuse to testify in support of the employer position at an unfair labor practice hearing. Employees might well feel compelled to offer misleading statements to the Board if they knew they could be fired for showing reticence in coming forward with testimony favorable to the management side. Fair adjudication of disputes requires that witnesses be free from excessive external pressures to manufacture or withhold particular evidence.

ARGUMENT

The decision of the court of appeals is correct. It is consistent with the decisions of this Court and does not conflict with the decision of any other circuit.

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Petitioner argues that the discharge of Pennacchini did not violate that Section because Pennacchini did not file charges or give testimony. This contention is

inconsistent with *National Labor Relations Board* v. *Scrivener*, *supra*. There the court of appeals rejected the Board's finding of a Section 8(a)(4) violation where employees had been discharged for meeting with and giving evidence to a Board investigator, on the ground that that section could not "be extended to cover preliminary preparations for giving testimony." 435 F.2d 1296 (C.A. 8). This Court unanimously reversed, recognizing that, while Section 8(a)(4) "could be read strictly and confined in its reach to formal charges and formal testimony," it could "also be read more broadly." 405 U.S. at 122. Noting the necessity for avoiding "employer intimidation of prospective complainants and witnesses," the Court concluded that Congress intended "to afford broad rather than narrow protection to the employee." *Ibid.*

The decision below is correct if Section 8(a)(4) is "to afford broad rather than narrow protection" to Pennacchini. As shown above, the Board, upheld by the court of appeals, found that Pennacchini's discharge was caused by her refusal to testify to events she had not witnessed. Pointing out that this Court stated in *Scrivener*, *supra*, 405 U.S. at 122, that it was necessary for employees to have "complete freedom" to speak truthfully to the Board " 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses,' " the court of appeals correctly concluded that "[s]imilar considerations militate in favor of extending statutory protection to the activity

involved in this case" (Pet. App. 7a). Petitioner's attempt to distinguish *Scrivener* on the ground that Pennacchini never spoke to Board representatives (Pet. 8) is thus unconvincing. As the court recognized, had Pennacchini

> acquiesced in [petitioner's] request that she testify against Frazier, she could very well have perjured herself before the Board. The result would have been more serious than a closing of "channels of information" to the Board. It would have been the outright misleading of the Board. Coercing employees to give untrue testimony just as surely undermines the integrity of Board proceedings as does coercing employees to give no testimony at all. [Pet. App. 7a.]

Nor is there merit in petitioner's contention that the court of appeals' holding allows an employee to refuse an employer's request to testify in a Board proceeding, thereby impeding an employer's ability to present evidence (Pet. 9-12). As the court of appeals recognized (Pet. App. 9a-10a), the employer may subpoena a reluctant employee. Petitioner's failure to subpoena Pennacchini belies its claim that it was denied the opportunity to present evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

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